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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 693

BRANIFF AIRWAYS, INC., ET AL.,

Petitioners,

v.

THE TEXAS AERONAUTICS COMMISSION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the Supreme Court of Texas in this matter is reported at 454 S.W. 2d 199 (1970). The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, and the dissenting opinion, are reported at 439 S.W. 2nd 699 (1969).

JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3). Nowhere in their Petition for Certiorari, however, do they explicitly and specifically set forth wherein, in the prior State proceedings: (1) the validity of a treaty or statute of the United States was drawn in question; or (2) the validity of a Texas statute was drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States; or (3) any colorable title, right, privilege or immunity was specially set up or claimed by them under the Constitution,

treaties or statutes of the United States. Petitioners also omit from their Petition the usual section pertaining to "Statutes and Constitutional Provisions Involved," and in their "Index to Authorities" the only Federal laws which they cite are the Civil Aeronautics Act of 1938, which has been repealed, and the Federal Aviation Act of 1958, which does not confer upon them any "title, right, privilege or immunity" to be free of competition and which, further, does not apply at all to intrastate aviation or to State proceedings in connection therewith, as will be hereinafter demonstrated. The only conclusions that can logically be drawn, therefore, are that Petitioners have filed their Petition solely for the purpose of delay and that they are completely incapable of citing any Federal law which even applies to these proceedings, much less a Federal law which has been violated herein.

As will be more fully discussed under "Argument" below, Petitioners have not carried the burden of establishing this Court's jurisdiction to review the judgment of the Supreme Court of Texas, and, in fact, no such jurisdiction exists.

QUESTION PRESENTED

When the Congress of the United States has chosen not to regulate the economic aspects of intrastate aviation, does the certification of an intrastate air carrier by a State Commission, after due notice and opportunity to be heard have been afforded to all other air carriers affected and to the Civil Aeronautics Board, violate any Federal law or create an unconstitutional burden on interstate commerce?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No provisions of Federal law are involved in this proceeding, and Petitioners do not directly cite any such pro-

visions as being so involved. It is discernible by inference from their Petition, however, that, at least impliedly, they allege the involvement of Article I, Section 8, Clause 3 of the United States Constitution, which provides that the Congress shall have power:

> "To regulate Commerce . . . among the several states . . .;"

STATEMENT

Respondent Air Southwest Co. (hereinafter called "Air Southwest") applied to the Texas Aeronautics Commission for a Certificate of Public Convenience and Necessity authorizing Air Southwest to provide scheduled commuter air service between only the Texas cities of Dallas/Fort Worth, Houston and San Antonio. Pursuant to Article 46c-6(3), Vernon's Annotated Civil Statutes, copies of Air Southwest's application were served upon the Civil Aeronautics Board, the Federal Aviation Agency and all other airlines (interstate as well as intrastate) serving the same, or substantially the same, routes sought to be served by Air Southwest. Petitioners Braniff Airways (hereinafter called "Braniff"), Continental Airlines, Inc. (hereinafter called "Continental") and Trans-Texas Airways, Inc. (now Texas International Airlines, Inc., but hereinafter called "Trans-Texas") were the only parties served who intervened in opposition to the granting of Air Southwest's application.

After a seven day hearing, followed by briefs and oral argument, the six members of the Texas Aeronautics Commission unanimously granted a Certificate of Public Convenience and Necessity to Air Southwest.

The Petitioner airlines then appealed to the 98th District Court of Travis County, Texas, wherein, in accordance with Texas law, they were granted a plenary hearing which continued from March 25, 1968 through May 10, 1968, and resulted in the record which is before this Court, consisting of 2,947 pages of testimony plus 228 exhibits thereto. The District Judge of the 98th District Court decided against the Texas Aeronautics Commission and Air Southwest, vacated the Commission's order and granted a permanent injunction prohibiting the issuance of a Certificate of Public Convenience and Necessity to Air Southwest.

The Texas Aeronautics Commission and Air Southwest thereupon appealed to the Third Court of Civil Appeals for Texas, which sustained the judgment of the District Court by a 2-1 majority.

The Supreme Court of Texas thereafter granted an Application for Writ of Error and, after briefs and oral argument, reversed and rendered judgment in favor of the Texas Aeronautics Commission and Air Southwest by a unanimous, 9-0 decision. (Petition for Certiorari, Appendix F)

Air Southwest will not carry United States mail, nor will it "interline" with any interstate air carriers by writing tickets for carriage over their routes or by accepting tickets providing for carriage over their routes and those of Air Southwest.

ARGUMENT

This case does not present any questions of Federal law. Therefore, this Court has no jurisdiction to review the judgment of the Supreme Court of Texas. Moreover, even if this Court had jurisdiction, there are no special and important reasons for its exercise by way of review.

I. The Civil Aeronautics Board Has No Jurisdiction Over Intrastate Commercial Aviation, And The Texas Aeronautics Commission Merely Regulates Intrastate Competition With Interstate Airlines, Which Such Competition Would Go Unregulated In The Absence Of Such A State Commission.

The Congress of the United States has consistently refused to grant to the Civil Aeronautics Board (hereinafter called "C.A.B.") the power to regulate the economics of intrastate aviation. The Federal Aviation Act of 1958, 49 U.S.C. § 1301, et seq., is crystal clear in this respect, and it is notable that Petitioners decline to discuss, or even cite, those portions of that Act defining and limiting the jurisdiction of the Board.

49 U.S.C. § 1371(a) provides that "No air carrier shall engage in any *air transportation* unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation." (Emphasis supplied) 49 U.S.C. § 1301(10) defines "air transportation" as meaning "*interstate . . . air transportation . . .*" (Emphasis supplied) 49 U.S.C. § 1301(21), in turn, specifies that "Interstate air transportation" shall mean:

> ". . . the carriage by aircraft of persons or property as a common carrier for compensation or hire . . . in commerce between, respectively —
>
> (a) a place in any State of the United States . . . and a place in any other State of the United States . . .; or between places in the same State of the United States through the airspace over any place outside thereof; . . ."

Thus, the C.A.B. has no jurisdiction to regulate the type of intrastate air transportation proposed by Air Southwest,

and the only remaining question is whether the Texas Aeronautics Commission may step in to fill this regulatory vacuum.

In the absence of conflicting Federal legislation, this Court has sanctioned the taxation and regulation by the States of even C.A.B. certificated, interstate air carriers. *Northwest Airlines* v. *Minnesota*, 322 U.S. 292 (1944); *Braniff Airways* v. *Nebraska State Board*, 347 U.S. 590 (1954); *United Airlines* v. *Public Utilities Commission*, 37 Cal. 2d 1, P. 2d (1952), dismissed "for the want of a substantial federal question," 342 U.S. 908 (1952); *People* v. *Western Air Lines*, 118 Cal. 2d 572, 268 P. 2d 723 (1954), dismissed "for the want of a substantial federal question," *sub. nom. Western Air Lines, Inc.* v. *California*, 348 U.S. 859 (1954). *A fortiori*, the States have the power to regulate air carriers, such as Air Southwest, which operate solely within a State and beyond the jurisdiction of the C.A.B.

Petitioners make the unique contention that the certification of Air Southwest by the Texas Aeronautics Commission *per se* created an "unconstitutional burden on interstate commerce." (Petition for Certiorari, p. 3)

If the Texas legislature had never created the Texas Aeronautics Commission and granted it licensing powers over intrastate airlines, the Petitioner airlines and the C.A.B. would never have had a forum in which to object to the certification of Air Southwest; the present legal proceedings would never have transpired; and Air Southwest would today be competing with the Petitioner air carriers, free of economic regulation and control by *any* governmental body. Therefore, the Petitioners are, in actuality but without articulation, asserting that regulation and control by Texas of otherwise unregulated and uncontrolled

intrastate aviation constitutes an unconstitutional burden on interstate commerce, which is a transparent absurdity.

It is, of course, obvious that the action of the Texas Aeronautics Commission with respect to Air Southwest did not, and could not, directly, or even indirectly, burden interstate commerce. This Court has permitted the States to set rates for intrastate freight shipments and passenger travel on interstate railroads which were under the jurisdiction of the Interstate Commerce Commission (*Simpson* v. *Shepherd*, 230 U.S. 352 [1913]); to tax the full, unapportioned value of all of the airplanes used in interstate commerce by a domiciliary airline subject to the jurisdiction of the C.A.B., as long as such aircraft were not permanently located outside the State (*Northwest Airlines* v. *Minnesota*, 322 U.S. 292 [1944]); to tax the apportioned value of the flight equipment of an interstate, C.A.B. certificated air carrier which landed at, and departed from, airports within the State (*Braniff Airways* v. *Nebraska State Board*, 347 U.S. 590 [1954]); to regulate the intrastate rates of an interstate airline operating under a C.A.B. certificate (*United Airlines* v. *Public Utilities Commission*, 37 Cal. 2d 1, ... P. 2d ..... [1952]), dismissed "for the want of a substantial federal question," 342 U.S. 908 [1952]); and to fine an interstate airline for raising rates on intrastate routes at the suggestion of the C.A.B. (*People* v. *Western Airlines*, 118 Cal. 2d, 672, 268 P. 2d, 723, dismissed "for the want of a substantial federal question, *sub nom. Western Air Lines, Inc.* v. *California*, 348 U.S. 859 [1954]). Surely, if all of these activities by the States do not create an unreasonable burden on interstate commerce, regulation and control of otherwise unfettered competition by the State of Texas creates no such burden. Here, the State of Texas is not, under any conceivable theory or in any guise whatsoever, acting to impose any burden on the interstate air-

lines. In the course of regulating its internal commerce, it has merely reached a conclusion that additional and better air service is needed between some of its cities; a conclusion which Petitioners may dispute but which does not rise to the level of a constitutional issue.

In essence, the creation of the Texas Aeronautics Commission and the grant to it of certification powers over intrastate airlines has had only a beneficial effect upon the interstate air carriers. They, and the C.A.B., have been provided with a forum they would not otherwise have had for the airing of their objections to the certification and operation of intrastate air carriers in Texas. They have also been enabled to appeal to the State courts for redress of their grievances, including their complaint that competition from Air Southwest will possibly have a deleterious effect upon their interstate operations.

In hopes that reiteration will breed belief, Petitioners many times, and in various ways, assert in their Petition that the Texas Aeronautics Commission and the State judiciary gave no consideration to the "adverse effect" that competition from Air Southwest might have upon the interstate air carriers. Petitioners do not allege deprivation of "due process," and cite no Federal law requiring that such matters be taken into account by the State. Furthermore, Respondents know of no such law. The legal significance of Petitioners' assertions is therefore unexplained and left completely vague. Nonetheless, the complete and unassailable answer to Petitioners' contentions in this regard is that such contentions are palpably and demonstrably untrue.

Article 46c-6(3), Vernon's Annotated Civil Statutes, requires the Texas Aeronautics Commission, in determining whether or not public convenience and necessity dictates

the issuance of a certificate, to "take into account . . . *the effect on existing carriers.*" (Emphasis supplied) Both the Commission and the Texas courts entertained and decided this issue with respect to the Petitioner interstate air carriers, as it was explicitly and forthrightly litigated in the State proceedings. The Texas Aeronautics Commission and the Texas Supreme Court rightly concluded, however, that the Petitioner airlines had failed to show any undue harm resulting to them from the inauguration of the Air Southwest service. The reasons for their reaching this conclusion are exhaustively set forth in Point III of Respondents' Application for Writ of Error to the Supreme Court of Texas, which Point is completely reproduced in Appendix A to this Brief in Opposition. At most, Petitioners' contentions with regard to "undue harm" boil down to a dissatisfaction with the evaluation of the evidence made by the Texas Supreme Court, which regarded this issue as so frivolous that it did not even chose to write on it. This, however, affords no basis for review by the United States Supreme Court.

II. Even If This Court Has Jurisdiction, There Are No Special And Important Reasons For Granting Review On Writ Of Certiorari Herein.

Petitioners evidently seek to imply that the Texas Aeronautics Act and the Texas Aeronautics Commission may stand, but that, for some arcane reason, the Commission may not certificate intrastate airlines that would compete with interstate carriers. If accepted, this reasoning would, of course, produce the best of all possible worlds for the Petitioners. No intrastate airline could fly in Texas without a Certificate from the Texas Aeronautics Commission, and the Texas Aeronautics Commission could not grant such a

Certificate if its issuance would create competition for C.A.B. carriers.

There is no logical way, however, for Petitioners to "have their cake and eat it too." The Texas Aeronautics Act, as a measure regulating commercial intrastate aviation, is either constitutional or unconstitutional. The Texas Aeronautics Commission, therefore, may either act to certificate intrastate air carriers, or it may not. There is no middle ground. If this Court sets aside the Texas Aeronautics Act, Air Southwest can immediately go into business and compete against the C.A.B. airlines without any governmental regulation or control whatsoever. Thus, there is no reason at all for this Court to review the judgment of the Texas Supreme Court, since the ultimate result, insofar as Petitioners are concerned, will be the same in any and all events. They will be faced with Air Southwest competition, either fettered or unfettered.

Furthermore, Petitioners, through the use of vaguely threatening generalities, grossly overemphasize the supposedly deleterious effects of such competition upon them. The true story is set forth in Appendix A to this Brief in Opposition. Suffice it here to state that Continental testified the introduction of Air Southwest's service would not impair the scope of its operations, and neither Braniff nor Trans-Texas could say that they would, as a result thereof, lose even a *single* present passenger.

Another significant factor strongly indicating that there are no special or important reasons for review is the failure of the C.A.B. to intervene in this proceeding and to oppose the granting of Air Southwest's application. The C.A.B. was served with that application but took no action

to be heard in the State proceedings. This clearly creates the inference that the C.A.B. did not regard competition from Air Southwest as a threat to interstate commercial aviation, nor as particularly significant to C.A.B. affairs, including the matter of subsidy reductions. Petitioners attempt to dispel this inference by reference to the "Amicus Curiae" brief filed in the Texas Supreme Court by Mr. John H. Crooker, Jr., former Chairman of the C.A.B., such brief appearing as Appendix H to their Petition for Certiorari. Petitioners would be more persuasive in this regard were it not for the facts that:

1. Mr. Crooker's law firm, Fulbright, Crooker, Freeman, Bates & Jaworski, of Houston, Texas, represented Petitioner Trans-Texas at the hearing before the Texas Aeronautics Commission in this very matter (see Court Reporter's list of "Appearances" in Appendix B hereto);

2. Mr. Crooker's law firm, Fulbright, Crooker, Freeman, Bates & Jaworski, of Houston, Texas, represented Trans-Texas at the time that Mr. Crooker prepared his "Amicus Curiae" Brief, as evidenced by an S-1 Registration Statement and Preliminary Prospectus filed with the Securities and Exchange Commission, excerpts from which appear in Appendix C hereto;

3. Mr. Crooker's "Amicus Curiae" Brief was deposited with the Texas Supreme Court on or about July 6, 1970, over seven weeks after that Court had rendered its opinion herein, on May 13, 1970, and three weeks after that Court had overruled Petitioners' Motion for Rehearing herein, on June 17, 1970 (see Petition for Certiorari, Appendix H-6);

4. The asserted "cause" for the preparation of the

"Amicus Curiae" Brief was a mere statement of fact by the Texas Supreme Court that the C.A.B. had been served but did not appear in the State proceedings, (see Petition for Certiorari, Appendix F-2 and H-5);

5. Insofar as Respondents can ascertain, the Texas Supreme Court never granted Mr. Crooker's Motion for Leave to File his "Amicus Curiae" Brief;

6. If the C.A.B. regarded Air Southwest as a potentially important economic hazard to the health of interstate aviation, its only recourse was to appear and be heard in the State proceedings; and

7. The C.A.B. has not previously been reluctant to intervene and assert its interests, even in bankruptcy proceedings (*In re Airlines Transport Carriers*, 129 F. Supp. 679 [S.D. Cal. 1955]).

Air California and Pacific Southwest Airlines (PSA) are both large, eminently successful, intrastate airlines, serving only points within the State of California and operating without C.A.B. Certificates of Public Convenience and Necessity. As to routes and rates, they are regulated solely by the California Public Utilities Commission, and together they carry millions of passengers each year. (R. 771-5; 1337-5; 1366-9; 1472-6; 1474-11) The probable reason for the nonintervention of the C.A.B. herein is its high regard for the beneficial effects that intrastate competition has upon interstate airlines and air commerce generally. As stated by Mr. Charles S. Murphy, then Chairman of the C.A.B., in a portion of his letter to the House Committee on Interstate and Foreign Commerce on July 10, 1967, reprinted in 113 Cong. Rec. 8473 (daily ed. July 11, 1967):

"It does not appear that State authorizations for intrastate air carriers have had a substantially adverse effect upon the development of the federally regulated air transportation system. They have given rise to some problems; *e.g.*, the impact of PSA's operations in California upon Pacific, which is federally subsidized. *But there is little doubt that PSA's operations have had a salutary effect upon air travel in California by way of improved service, lower fares, and increased volume.*" (Emphasis supplied)

Finally, Petitioners attempt to create the impression that there is, or will be, a growing proliferation of major intrastate air carriers competing with the interstate airlines operating under the Federal system. This is patently untrue. Pacific Southwest Airlines (PSA) was the only sizeable intrastate air carrier in the country, from its founding in the 1940's until Air California began operations in 1967. Air Southwest would be only the third such carrier, and the opportunities for the development of others are extremely limited by geography and population. In order for an airline of this nature to be successful, there must be an unusual combination of several high density population centers within a single state, which centers are far enough apart to need air transportation between them. This ideal situation is rare within the United States, so that a major onslaught of intrastate against interstate commercial aviation is impossible.

CONCLUSION

The decision by the Texas Supreme Court is clearly correct; this Court has no jurisdiction to review that decision; and, in any event; no special or important reasons for review exist herein.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Point III Of Respondents' Application For Writ of Error In The Supreme Court of Texas

"POINT III
(Restated)

The Court Erred In Failing To Hold That There Is Substantial Evidence That A Certificate Of Public Convenience And Necessity Can Be Issued To Air Southwest Without Undue Or Illegal Harm To Existing Air Carriers And That The Exercise Of Rights Thereunder By Air Southwest Will Not Irreparably Harm Respondents."

POINT III
(Restated)

The Court Erred In Failing To Hold That There Is Substantial Evidence That A Certificate Of Public Convenience And Necessity Can Be Issued To Air Southwest Without Undue Or Illegal Harm To Existing Air Carriers And That The Exercise Of Rights Thereunder By Air Southwest Will Not Irreparably Harm Respondents.

Under Article 46c-6(3), Vernon's Civil Statutes, the Commission is instructed to "take into account" the "effect on existing carriers" in determining whether or not to grant a certificate of public convenience and necessity. The dissenting opinion of Mr. Justice O'Quinn finds that the Commission had before it "substantial evidence that no existing airline would be unduly harmed by the commuter service proposed by Air Southwest." P. 3. The majority did not rule in favor of Air Southwest on the issue of "competitive effect," and thereby committed error.

Respondents contend that the issuance of a certificate to Air Southwest would cause them undue injury because of the financial losses they might incur as a consequence. Even if this were so, the Texas Aeronautics Commission was entitled to issue the certificate. Under the governing statute, the Commission need only "take into account" financial harm to an existing carrier, and such harm is no bar to the licensing of a new carrier unless the statute explicitly so provides. The law of Texas is clear on this point.

In *Texas Motor Coaches, Inc. v. Railroad Commission*, 59 S.W. 2d 923, 925-26, (Tex. Civ. App. 1933), *aff'd* 73 S.W. 2d 511 (Tex. Sup. 1934), the Railroad Commission authorized competing bus service over a parallel route, despite the fact that Texas Motor Coaches, Inc. had lost money from the inception of its operation. Texas Motor Coaches

maintained that it could make a reasonable profit were it not for the competition afforded by the new certificate holder. The Court stated:

". . . *The public need and convenience, and not the effect on existing carriers, is the matter of first concern*, though the latter is undoubtedly a matter for the commission to take into consideration in granting such permit. Petersburg, etc. Ry. Co. v. Virginia, 152 Va. 193, 146 S.E. 292, 67 A.L.R. 931; 42 C.J. 688. The Commission should, and is so directed by the statute, take into consideration the effect that granting competitive service between the same termini would have upon the continued ability of existing motorbus carriers to render and continue an adequate service, commensurate with public convenience and needs; and should so act as to protect the public interest. *If public convenience and need outweigh, as the trial court and the commission found in this case that it did, the private interests of those already in the field, the latter became subservient to the former, and must abide the result; even though it involve a financial loss. All these things, and the weight to be given them, were matters within the scope of the powers delegated to the Commission to determine; and, unless the commission abused its discretion in the conclusion reached, the courts are not at liberty to set aside the result.* Texas Motor Coaches v. R.R. Com. (Tex. Civ. App.) 41 S.W. 2d 1074, 1078; R.R. Com. v. Shupee, supra; Mayor of Houston v. Houston St. Ry. Co., 83 Tex. 548, 19 S.W. 127, 29 Am. St. Rep. 679; Section 5, art. 10, Texas Constitution. *And this is true where the use of the same highway is involved. . . .*" See also *Metrobus Lines v. Railroad Commission*, 188 S.W. 2d 210 (Tex. Civ. App. 1945), *rev'd on other grounds* 191 S.W. 2d 10 (Tex. Sup. 1946); *Texas Motor Coaches v. Railroad Commission*, 41 S.W. 2d 1074 (Tex. Civ. App. 1931) (no writ); *Kerrville Bus Co. v. Continental Bus System*, 208 S.W. 2d 586 (Tex. Civ. App. 1947) (writ ref'd, n.r.e.) ("*Not being entitled to a monopoly, appellant cannot rightly complain that competition will cause it to operate at a loss . . .*")

No other rule makes any sense, for if respondents' contention were correct, the public would be forever "stuck" with inadequate and insufficient transportation service simply because competition might produce losses, or greater losses, for the incumbent. However, the Commission did not need to reject respondents' contentions of undue harm on the basis of this rule of law alone because there is substantial evidence that such contentions are, in any event, unfounded.

(A) *Continental.*

Mr. Sam B. Redmond, Vice President for Regulatory Proceedings of Continental Airlines, testified on direct examination that Continental is profitable; that Air Southwest's competition would not cause it to be unprofitable; and that Continental, regardless of whether Air Southwest is certificated, does not anticipate, in the years to come, any difficulty in arranging the financing to serve all parts of its system, including San Antonio-Houston. (S.F. 328) Continental, therefore, concedes that competition from Air Southwest will not cause it undue or irreparable harm. Moreover, this is obviously the case, since Continental's San Antonio-Houston passengers provide a mere .007% of its total revenue passenger miles. (S.F. 382-9, et seq.)

(B) *Braniff*

Braniff International, through Mr. Robertson, introduced a number of exhibits designed to show that it was a weak trunk carrier which would be deleteriously affected by competition from Air Southwest. These will not be discussed in detail because there is substantial evidence that this proposition verges upon the ridiculous.

Air Southwest Exhibit 1 is Braniff's 1967 Annual Report. It alone contains the following relevant information:

(1) *Revenue passenger miles.* A revenue passenger mile (RPM) represents one airline passenger flown one mile. This is a significant measure of the amount of revenue earned by an airline. (S.F. 383-20, et seq.; 549-1)

The "Results in Brief" appearing on the first page of the Annual Report show that Braniff's RPM's increased from 3,059,574,000 in *1966* to 4,765,711,000 in *1967*, a gain of *55.76%*. At the same time, its total operating revenues soared from $187,826,551 to $256,376,689, or *36.50%*. According to the C.A.B. Competition Survey for April 1 through June 30, 1967, Braniff flew a total of 35,675,010 RPM's between Houston-San Antonio-Dallas-Fort Worth during that quarter. Its RPM's for *only its domestic system* were 558,957,550. Thus, its Houston-San Antonio-Dallas Fort Worth RPM's constitute only about *6.3%* of its total *domestic* RPM's. (S.F. 547-10 to 548-25). To these must be added the RPM's generated by its international flights, which are not set forth specifically in its Annual Report. That Report states on page 5, however, under the chart entitled "Operating Revenues," that "the domestic division now comprises only 65% of total revenues." If the 35% of revenues produced by the international division is converted to RPM's, it signifies that Braniff flew approximately *858,000,000 RPM's* domestically and internationally during the quarter April 1 through June 30, 1967, and that its Houston-San Antonio-Dallas/Fort Worth RPM's are about *4%* of its system total. *Air Southwest could divert but a fraction of this 4%, so Braniff would not appear to be in great jeopardy from an Air Southwest invasion.*

(2) *New routes.* Some of the new routes for which Braniff is applying to the C.A.B. are set out on page 8 of its Annual Report under the heading, "New Routes — Vital to the Long-Term Growth of Braniff." These do not include an additional ten or so route cases in which Braniff

is participating but which it did not deem significant enough to list. It was admitted that if Braniff secures even a small percentage of the route authority which it seeks, its revenues will increase very significantly. (S.F. 540-22) *The already miniscule importance of its Houston-San Antonio-Dallas/Fort Worth RPM's and revenues will also, of course, further diminish.*

(3) *Operating income.* As set forth in its "Statement of Income" at page 13 of its 1967 Annual Report, Braniff's tremendous growth in RPM's and revenues was paralleled by a 526% increase in operating income between 1963 and 1966, from $3,898,791 to $24,422,671. In 1967, however, its operating income dropped to $14,461,404, despite the 55.76% increase in RPM's and the 36.50% increase in operating revenues. At the same time, its system return on investment declined as shown in its Exhibit 30, which was prepared to demonstrate how poorly Braniff is faring lately.

The mere statement of a tremendous increase in revenues accompanied by a notable decline in operating income provokes the suspicion of extraordinary, non-recurring expenditures, and such is the case with Braniff. As discussed in the letter from Mr. Harding L. Laurence to his stockholders, at page 3 of the Annual Report, during 1967 Braniff underwent: (1) substantial non-recurring and start-up costs relating to its absorption of Pan American-Grace Airways; (2) an increase in depreciation and amortization expense of *75%*, or 11.3 million dollars, connected with acquisition of *22* new jet aircraft (S.F. 557-7); and (3) an increase in interest and debt expense of *140%*, or 6.8 million dollars, again attributable to the purchase of the aircraft. As stated by Mr. Laurence, however, operating costs declined *23%* in 1966-1967, and:

> "Finally, let us express satisfaction with the successful completion of Phase 1 of our long-term program. We believe Braniff now to be highly competitive in its industry. *While this was accomplished at the expense of 1967 earnings, it was a prerequisite to further important growth.* We anticipate, therefore, marked improvement in financial results in 1968."

As Mr. Robertson was finally constrained to concede, 1967 represented an investment in the future of Braniff, and it would expect to grow substantially even if Air Southwest were authorized to commence operations. (S.F. 558-3, *et* seq.)

(4) *Revenues.* On its Exhibit 31, Braniff calculates the *so-called* diversion of passengers it would anticipate in 1969 if Air Southwest became a competitor. Of greatest significance is Braniff's definition of "diversion." *It includes in its figures not only the passengers it now carries, but the passengers it would expect to carry in 1969 as the market increased through normal growth.* (S.F. 588-10) This means that, in effect, it deems not only the 1967 actual passengers, but the 1968 and beyond passenger increases to be appropriated to itself. When queried about this, Mr. Robertson was unable to state whether the so-called 1969 "diversion" signified that Braniff would lose *even one passenger* from its 1967 totals if Air Southwest entered the market. (S.F. 588-17 to 589-8)

Forgetting for the moment that this so-called "diversion" includes estimated normal O & D market increases, we find on its Exhibit 31 that Braniff predicts that in *1969* it may have *$1,425,334* less in revenues if Air Southwest commences operations. Its operating revenues in *1967* were *$256,376,689*, an increase of *36.50%* over 1966. If the 36.50% increase from 1966 to 1967 is taken as an average, Braniff's *1969* operating revenues project at roughly *$476,000,000*.

Thus Air Southwest's competition might, at the most, cause its 1969 operating gross to be reduced from *$476,000,000* to *$474,575,000*, or three one-thousandths (.003%). If the elephant is in mortal danger from the flea, then Air Southwest may cause "undue harm" and "irreparable injury" to Braniff.

(C) *Trans-Texas.*

Trans-Texas is a smaller "elephant" which is also experiencing growing pains. Mr. Mackey, who is its Financal Vice President, attempted to present a gloomy picture of its cash flow situation, capability of complying with negative covenants in a loan agreement and profitability. (S.F. 5, et seq.) It again turns out, however, that its difficulties, however magnified in order to prevent competition, are, at worst, temporary in nature and attributable to recent aircraft acquisitions. Trans-Texas is exceedingly healthy and developing at a lusty pace, as revealed by its 1966 Annual Report, which is Trans-Texas' (Pet.) Exhibit 16, although first produced by Air Southwest on cross-examination. (S.F. 61-14) Pages 16 and 17 of the Annual Report contain a ten year summary of the company's traffic and financial results.

(1) *Passengers carried.* During the period 1957-1966, the number of passengers carried by Trans-Texas went from 243,000 to 1,225,000, an increase of over *400%*.

(2) *Revenue Passenger Miles.* RMP's have grown by *400%*, from 55,330,000 to 277,945,000.

(3) *Passenger load factor.* In 1966, Trans-Texas experienced its highest passenger load factor in ten years. This is undoubtedly one reason why it added additional equipment in 1967, which caused its load factor to drop tem-

porarily from 46% in February, 1966 to 40.75% in February, 1967. (S.F. 85-19) Any time that an airline adds large quantities of additional seats, it can expect its load factors and profitability to sag temporarily before the increase in passenger boardings catches up with the additional capacity. (S.F. 92-5) The process is analogous to doubling the size of a 500-room hotel. Management does not expect all of the added rooms to be filled up immediately and, in the interim, its interest, amortization and depreciation expenses will cut its net profit. Ultimately, however, the expanded capacity will result in even greater profits if the market is growing, and, as has been seen, the air travel market is growing at a furious rate.

(4) *Revenues before subsidy.* These have increased from $3,698,000 to $21,802,000, or *480%*.

(5) *Net earnings.* These have grown by *620%*, from $125,000 to $903,000.

(6) *Net earnings per share.* Over ten years, these grew *342%*, from $0.26 to $1.15.

(7) *Shareholders' equity.* This increased from $929,000 to $5,873,000, or *530%*.

Any business, from shoe manufacturer to film supplier, that had *averaged* a *48%* per annum increase in revenues over ten years, a *62%* per annum growth in net earnings and a *53%* per annum enhancement of stockholders' equity, would consider that it was forging ahead at an exceptional pace. Trans-Texas, however, would like the splendid progress of its markets and of its company to be overlooked so that it can dwell solely upon its actual loss of $167,000 in 1967, and its *estimated* loss of $500,000 in 1968.

Accepting the projected loss at face value, do these results indicate a tremendous diminution in the vigorous de-

velopment of Trans-Texas or an extraordinary, non-recurring investment in the future which shows its confidence in its prospects for continued expansion? The answer is obvious from cross-examination. Total revenues, including subsidy, went from *$27,480,000* in *1966* to *$32,234,000* in *1967* and are projected for *1968* at *$40,173,000*. (S.F. 65-25; 89-21) This is a *46%* increase over two years, despite the concomitant reduction in subsidy, which will be discussed below. *The real reason for Trans-Texas' temporary embarrassment is its capital expenditures for modification of its Convairs and acquisition of its DC-9's, which increased its available seat miles by an astounding 70% in 1967 alone.* (S.F. 85-14) These equipment changes and additions engendered the following increases in its expenses over the two years from the end of 1966 to the end of 1968: (1) depreciation — $692,000 to $3,185,000 (+*360%*); and (2) interest — $597,000 to $2,571,000 (+*330%*). (S.F. 90-14 to 92-9) The modified Convairs and DC-9's operate at lower seat mile costs than Trans-Texas' previous equipment and are, of course, acquired in order to produce improved efficiency and greater profitability. (S.F. 66-17; 68-7)

Trans-Texas maintains that it should not be faced with Air Southwest competition since it has made its equipment expenditures and commitments without any expectation of such competition. This is the same argument made by banks which have just constructed new bank buildings when they are faced with an application for a competitive charter. Pursued to its logical extreme, it signifies that regulated companies which make large capital investments should never be subjected to any additional competitive factors. The mere statement of the proposition is enough to cause its rejection. The application of this theory to the airline industry would completely and absolutely stagnate existing route authority, since airline companies are

continually upgrading already owned aircraft and purchasing additions to their fleets. *The truth is that no business, whether it be regulated or unregulated, pursues a capital improvement plan in the firm expectation that its competitive position will remain unimpaired.* Continental, for instance, presently has applications before the C.A.B. for some of Trans-Texas' routes, and in 1965 it carried 62.47% of the O & D passengers between San Antonio and Houston, despite the long haul restriction on its authority. (S.F. 384-25; Air SW Exh. 23, p. 9) Trans-Texas never did, and never rightfully could, assume that its present position in the Houston-San Antonio-Dallas Fort Worth markets would remain static. (S.F. 277-6)

Trans-Texas' dire forebodings concerning the possible effect of Air Southwest's competition upon its present financial condition are induced by the expediencies of this litigation, rather than true apprehension. This is confirmed by the fact that, despite its supposedly precarious cash flow and supposedly imminent violation of its loan agreement, it is accepting delivery of additional DC-9's at $4,000,000 plus per plane and has more DC-9's on order, which it would admittedly have to purchase if it secured further route authority from the C.A.B. (S.F. 74-14; 88-1; 94-2) Its Financial Vice President concedes that it can float a securities issue and that it has been recommended for additional route authority by the Bureau of Operating Rights of the C.A.B. and by a C.A.B. hearing examiner. (S.F. 29-14; 70-18; 72-7) Its President states that it has a "commitment" from the C.A.B. for additional route authority, and its Vice President of Research computes that if it is successful in but one pending C.A.B. route case, the Gulf States-Midwest Points Service Investigation, its operating revenues will jump to $77,888,273 and its profits to $23,707,041 by 1969. (S.F. 187-3 to 189-1; 2702-18) Finally,

it complains about proposed subsidy reductions by the United States government, implying that these would come on top of Air Southwest's competitive effect. But it develops that under the subsidy formula, the amount paid by the government declines 12 cents only for each *increase* of $1.00 in revenue, so, to the extent Air Southwest might take revenues away from Trans-Texas, the latter's subsidy will *not* be reduced. (S.F. 19-23 to 21-11)

Having refuted Trans-Texas' general contentions in the "wolf, wolf" category, it is now time to evaluate its specific forecasts of the significance of the Air Southwest competitive effect. Trans-Texas (Pet.) Exhibit 35 sets forth Mr. McCutcheon's calculations of the revenues of which Trans-Texas will be deprived by Air Southwest's entry into the Houston-Dallas/Fort Worth-San Antonio air passenger markets.

The fundamental method of computation for each city-pair is displayed on the attachments to Exhibit 35. Mr. McCutcheon, in each instance, figures the number of O & D and connecting passengers Air Southwest will presumably take from all other carriers and converts this to revenues, based upon their jet coach fares, less an allowance for dilution caused by less than full fare passengers. He then multiplies these revenues by Trans-Texas' *presumed* share of each market in order to determine the amount of revenues he estimates Trans-Texas itself will lose to Air Southwest. For example, in the Houston-Dallas/Fort Worth market, he concludes that in 1968, Air Southwest would deprive the existing carriers of a total of $865,656, and that Trans-Texas' share of this would be $354,919, predicated upon an *assumed* market participation of 41%. *Obviously, if Trans-Texas has overestimated its market shares, the revenues it might lose are correspondingly overstated. This proves to be the case.* By its own admission, Trans-

Texas has only *30%* of the Houston-Dallas/Fort Worth market, yet it used *41%* to calculate diversion. (S.F. 264-3) It used *15%* as its market share between San Antonio-Dallas/Fort Worth, when the latest official figures show its percentage to be only *7%*. (S.F. 266-6). And its San Antonio-Houston participation factor of *8%* is not founded upon any market share figures available at the time of the hearing. (S.F. 267-3) *Even accepting Trans-Texas' own definition of "diversion," we find that, once again, it has exaggerated its case.*

The so-called "diversion" involved is not, in any event, what it appears to be, nor nearly as significant as Trans-Texas would claim. As previously noted, Trans-Texas predicts that its revenues will climb from $32,234,000 in 1967 to $40,173,000 in 1968, a one year gain of almost *25%*. *If its overinflated "diversion" figure of $591,285 for 1968 is taken at face value, this will merely reduce its revenue increase from $7,939,000 to $7,347,715 and its 1967-1968 rate of revenue gain from almost 25% to roughly 23%.* Furthermore, page 16 of Trans-Texas' 1966 Annual Report (Pet. Exh. 16) shows that between 1957 and 1966 that company's *highest* percentage of earnings to revenues was *3.3%*. *The assumed 1968 "diversion" of $591,285 in revenues thus represents, at most, an earnings loss of only $19,182.04.* Finally, and most conclusively, *Trans-Texas*, like Braniff, *admits* that its "diversion" calculations include the normal growth of the market and that, in reality, *Air Southwest's competition would not cause it to carry one less passenger or to earn one less revenue dollar in the Houston-San Antonio-Dallas/Fort Worth markets than it carried or earned in 1967.* (S.F. 272-17; 274-8; 308-6) Once again, it is simply saying, in effect, that "we don't want competition that will cause even the slightest drop in our rate of growth and we consider not only our present passengers and revenues

to belong to us but also *all* those to be generated in the future."

(D) *Other Authorities.*

As set forth at the commencement of this point, under the terms of the Texas Aeronauties Act and the case authorities in Texas, public convenience and necessity overrides all other considerations, and the Commission was empowered to grant Air Southwest a certificate even if such grant would cause severe financial losses and disruption to the C.A.B. carriers. Assuming the "undue" harm rule did apply, however, the Commission was justified in concluding that there is substantial evidence Air Southwest's service will not cause any *undue* competitive harm to the other carriers.

It has been conceded that the C.A.B. carriers do not welcome competition along their routes. (S.F. 277-15) The natural reluctance of such carriers to compete with a vigorous, aggressive and determined intrastate airline such as Air Southwest nevertheless does not demonstrate that they are injured in a legal sense, or even affected by the entry of Air Southwest into the intrastate market. The evidence before the District Court which has been offered by Air Southwest shows that the new service will substantially stimulate the market and that any loss of *future* business experienced by the existing carriers will be both minimal and temporary in view of the rapidly expanding demand for air service and their own rapid growth rates. This is certainly not an undue or excessive injury to existing carriers.

Trans-Texas has offered conflicting data which shows that Air Southwest will not penetrate the market significantly, and, on the other hand, that Air Southwest will erode the Trans-Texas market. These paradoxical claims

are both far from the mark, and the evidence supports Air Southwest's position that its lower fares and superior service will stimulate air traffic in a fashion similar to that produced by Pacific Southwest Airlines and Air California along the Pacific coast. It is apparent that, within a very short time, the implementation of Air Southwest's proposal will not only be a benefit to the general public but even to presently certificated air carriers. For instance, Air Southwest Exhibit No. 14, "Traffic, Fares and Competition, Los Angeles-San Francisco Air Corridor," shows that the Los-Angeles-San Francisco air fares, due to the entry of Pacific Southwest Airlines into the market, were reduced from an average of $20.25 in 1961 to an average of $16.14 in 1964 and that PSA's 1964 fare was $12.00 for this 347 mile trip. (Pg. 6, 7 and 11) Despite the lower yield per trip mile, the increase in passengers generated by the reduced fares and improved commuter service resulted in *extra* total airline corridor revenues of $208,000 in 1962, $2,100,000 in 1963 and $3,800,000 in 1964. (Pg. 22 and 23) As Charles S. Murphy, Chairman of the C.A.B., stated in a letter to the House Committee on Interstate and Foreign Commerce on July 10, 1967, reprinted in 113 Cong. Rec. 8473 (daily ed. — July 11, 1967):

> "It does not appear that State authorizations for intrastate air carriers have had a substantially adverse effect upon the development of the federally regulated air transportation system. They have given rise to some problems, *e.g.*, the impact of PSA's operations in California upon Pacific, which is federally subsidized. But there is little doubt that PSA's operations have had a salutary effect upon air travel in California by way of improved service, lower fares, and increased volume."

Although the C.A.B. air carriers opposing Air Southwest's application claim great "injury," they cannot demon-

strate that they will do more than lose exceedingly minor portions of their future growth. The Texas Supreme Court has written extensively on this particular issue with respect to savings and loan associations and has held repeatedly that loss of *future* business is not the type of "undue harm" which may prevent the entry of a new competitor into a regulated market. The Supreme Court's 1966 decision in *Gerst v. Nixon*, 411 S.W. 2d 350, 359, held that: ". . . In substance, the 'injury' resulting to Southeast Texas by the granting of a charter to a Livingston association would be related solely to competition for future business. *The probable slowing down of the rate of growth of an existing association because of a lessened opportunity to obtain business in a prospectively developing area because of competition cannot be regarded as an injury to such existing association.*" In *Gerst v. Cain*, 388 S.W. 2d 168 (Tex. Sup. 1965), this Court said:

> ". . . Competition is the lifeblood of a free enterprise economic system. It is only because savings and loan associations are affected with a public interest . . . that they are protected from *undue* injury brought about by *excessive* competition. Southwestern Savings and Loan Ass'n. of Houston v. Faulkner, 160 Tex. 417, 331 S.W.2d 917. There is no evidence here that the chartering of Metropolitan would provide *excessive* competition for existing associations which would result in undue injury to them." (388 S.W.2d at 171)
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> * * *
>
> "We doubt that proof of nothing more than that chartering a new association will make it 'more difficult' for an existing new association to increase its savings to 'a satisfactory level' can, under any circumstances, constitute substantial evidence to support a finding of *undue* injury to the association . . ." (388 S.W.2d at 171-172)

The Texas Aeronautics Act implicitly acknowledges that any new service which competes with already established air carriers will have an "effect" on the existing carriers. This "effect" is to be studied by the Aeronautics Commission. The Act nowhere suggests that the mere existence of established air carriers can defeat the entry of a new competitor. Indeed, even the hint of such monopoly power would be unconstitutional. "The Courts and every agency of the State are duty bound to avoid the creation, establishment or protection of monopolies which are contrary to the genius of a free government and which should never be allowed. Art. 1, Section 26, Texas Constitution, Vernon's Ann. St." *Gerst v. Cain*, 379 S.W.2d 699, 711 (Tex. Civ. App. 1964) *aff'd*, 388 S.W.2d 168 (Tex. Sup. 1964).

Certainly, Braniff, Continental and Trans-Texas did not carry their burden of proving that the Aeronautics Commission acted illegally, arbitrarily or without regard to fact on the issues of "undue harm" and "irreparable injury" to existing carriers. There is substantial evidence to support the Commission's determination.

APPEARANCES

For The Applicants, Air Southwest, Co.

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For The Intervenors In Opposition

MESSRS. JAMES M. VERNER and MICHAEL J. ROBERTS, Verner, Liipfert and Bernhard, 1035 Universal Building, North, 1875 Connecticut Avenue, N. W., Washington, D. C., 20009.

MR. WILEY CALDWELL, Fulbright, Crooker, Freeman, Bates and Jaworski, Bank of the Southwest Building, Houston, Texas, 77002.

MESSRS. W. B. WEST, III, ALLEN BUTLER and WILLIAM H. CLARK, Clark, West, Keller, Clark and Ginsberg, Adolphus Tower, Dallas, Texas, 75200, appearing on behalf of TRANS-TEXAS AIRWAYS.

APPENDIX C

Excerpts from S-1 Registration Statement and Preliminary Prospectus Filed by Petitioner Texas International Airlines, Inc. (formerly Trans-Texas Airways, Inc.) with the Securities and Exchange Commission of the United States

As Filed with The Securities and Exchange Commission on May 28, 1970

Registration No. 2-37513

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C. 20549

FORM S-1

REGISTRATION STATEMENT
Under
THE SECURITIES ACT OF 1933

TEXAS INTERNATIONAL AIRLINES, INC.

(Exact name of registrant as specified in charter)

8451 Lockheed Street
Houston, Texas 77017

(Address of principal executive offices)

W. LLOYD LANE, President
Texas International Airlines, Inc.
8451 Lockheed Street
Houston, Texas 77017

HOWARD WOLF
Fulbright, Crooker, Freeman, Bates & Jaworski
800 Bank of the Southwest Building
Houston, Texas 77002

(Names and addresses of agents for service)

Copies of communications to:

WHITE & CASE
14 Wall Street
New York, New York 10005

Approximate date of commencement of proposed sale to the public: As soon as practicable after the Registration Statement becomes effective.

Preliminary Prospectus dated May 28, 1970

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PROSPECTUS

450,000 Units

TEXAS INTERNATIONAL AIRLINES, INC.

2,250,000 Shares of Common Stock (Par Value $2)
With Warrants to Purchase 2,250,000 Shares of Common Stock

The Units will consist of five shares of Common Stock and one Warrant to purchase five shares of Common Stock at a price (both subject to adjustment under certain conditions) of $.... per share to and including ....., 1978, and $.... per share thereafter to and including ....., 1985, when the Warrants expire. The shares of Common Stock and Warrants included in the Units may be immediately transferred separately. It is expected Warrants will be traded in the over-the-counter market on the basis of one Warrant as representing the right to purchase five shares of Common Stock (see "Description of Warrants Offered Hereby").

The Units are being offered hereby subject to prior sale, to withdrawal or cancellation of the offer without notice, to delivery to and acceptance by the Underwriters, to the approval of their counsel, Messrs. White & Case, and of Messrs. Fulbright, Crooker, Freeman, Bates & Jaworski, counsel to the Company, and to certain further conditions. It is expected that delivery of the certificates will be made at the office of Dominick & Dominick, Incorporated, 14 Wall Street, New York, New York 10005, on or about ....., 1970.

Dominick & Dominick,
INCORPORATED

Eppler, Guerin & Turner, Inc.

The date of this Prospectus is .. .... 1970.